

Subpart H—Appeals

§ 9901.801 Purpose.

This subpart implements the provisions of 5 U.S.C. 9902(h), which establishes the process for Department employees to appeal certain adverse actions covered under subpart G of this part.

§ 9901.802 Applicable legal standards and precedents.

In accordance with 5 U.S.C. 9902(h)(3), in applying existing legal standards and precedents, MSPB and arbitrators, in applicable cases, are bound by the legal standard set forth in § 9901.107(a)(2).

§ 9901.803 Waivers.

When a specified category of employees is covered by an appeals process established under this subpart, the provisions of 5 U.S.C. 7701 are waived with respect to that category of employees to the extent they are inconsistent with the provisions of this subpart. The provisions of 5 U.S.C. 7702 are modified as provided in § 9901.809. The appellate procedures specified herein supersede those of MSPB to the extent MSPB regulations are inconsistent with this subpart. MSPB will follow the provisions in this subpart until it issues conforming regulations, which may not conflict with this part.

§ 9901.804 Definitions.

In this subpart:

Administrative judge or *AJ* means the official, including an administrative law judge, authorized by MSPB to hold a hearing in a matter covered by this subpart and subpart G of this part, or to decide such a matter without a hearing.

Class appeal means an appeal brought by a representative(s) of a group of similarly situated employees consistent with the provisions of Rule 23 of the *Federal Rules of Civil Procedure*.

Harmful error means error by the Department in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the error was harmful, *i.e.*, that it

caused substantial harm or prejudice to his or her rights.

Mandatory removal offense (MRO) has the meaning given that term in § 9901.103.

MSPB means the Merit Systems Protection Board.

Petition for Review (PFR) means a request for full MSPB review of a final Department decision.

Preponderance of the evidence means the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

Request for Review (RFR) means a preliminary request for review of an initial decision of an MSPB administrative judge before that decision has become a final Department decision.

§ 9901.805 Coverage.

(a) Subject to a determination by the Secretary under § 9901.102(b)(2), this subpart applies to employees in DoD organizational and functional units that are included under NSPS who appeal removals; suspensions for more than 14 days, including indefinite suspensions; furloughs of 30 days or less; reductions in pay; or reductions in pay band (or comparable reductions), which constitute appealable adverse actions for the purpose of this subpart, provided such employees are covered by § 9901.704.

(b) This subpart does not apply to a reduction in force action taken under subpart F of this part, nor does it apply to actions taken under internal DoD placement programs, including the DoD Priority Placement Program.

(c) Appeals of suspensions of 14 days or less and other lesser disciplinary measures are not covered under this subpart but may be grieved through a negotiated grievance procedure or an administrative grievance procedure, whichever is applicable.

(d) The appeal rights in 5 CFR 315.806 apply to the termination of an employee in the competitive service while serving a probationary period.

(e) Actions taken under 5 U.S.C. 7532 are not appealable to MSPB.

(f) Except as expressly provided in subpart C of this part, actions taken